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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 412

DOMINICK S. FAGO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 27, 1963.

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on June 28, 1963.

CITATION TO OPINION BELOW

The per curiam opinion of the Court of Appeals, affirming the conviction of the petitioner, was rendered on June 28, 1963, but has not yet been reported. It is reprinted in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1963. On July 25, 1963, Mr. Justice Harlan signed an order extending the time for filing this petition for a writ of certiorari to and including August 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether documentary evidence acquired by federal revenue agents, in collaboration with state agents, in violation of a state law imposing a "seal of secrecy" on state grand jury records must, in terms of the proper administration of criminal justice in federal courts, be excluded from a subsequent criminal trial in a federal district court.

STATUTORY PROVISIONS INVOLVED

Involved in this case is Section 952-t of the New York Code of Criminal Procedure, set forth in Appendix B hereto.

STATEMENT OF THE CASE

Petitioner was convicted, following a jury trial in the District Court for the Western District of New York, of violating 26 U.S.C. § 7201 by filing false and fraudulent income tax returns for 1954 and 1955 and of violating 26 U.S.C. § 7203 by failing, as principal officer of two wholly-owned corporations, to file six specified withholding tax returns due in 1955 and 1956. He was sentenced to imprisonment for 18 months and a $10,000 fine on each of the two income tax violations; the sentence on each of the six withholding tax violations was imprisonment for one year and a $5000 fine. The prison sentences were ordered to run con-

currently. The convictions were all affirmed by the Court of Appeals.

The facts relevant to the question now presented for review had their origin in an investigation commenced by the Erie County District Attorney's office relative to corruption among public officials in the City of Lackawanna, N. Y. This investigation began in September or October of 1955 and included inquiries into possible bribery of public officials by individuals or corporations contracting with the City.

Among the contracting corporations were three companies wholly owned by petitioner—John B. Schultz Contracting Co., Nottingham Contracting Corp., and Rosedale Builders, Inc. Petitioner thus was included among the many persons investigated. The target of this inquiry into petitioner's activities "was to establish the money that he had used, as we assumed, to bribe the public officials of the City of Lackawanna. A certain number of cash payments that we were never able to pin down." R. 467-48.

To that end, petitioner on or about May 7, 1956, was served with several subpoenas commanding him to turn over to the Erie County Grand Jury the records of these wholly-owned corporations. Petitioner himself was also subpoenaed to produce his own records and to give testimony. The corporate records were in the hands of petitioner's then attorney, one Hyman Karnofsky. Some time on or after May 23, 1956, following a court order, these records were delivered by Karnofsky under protest to the District Attorney. The grounds of this protest were said by the petitioner to involve a violation of "his privilege against self-incrimination as guaranteed by the Fifth Amendment

of the United States Constitution and Article I, Section 6 of the New York State Constitution and the Client Attorney Privilege." R. 1621.[1]

On June 19, 1956, the District Attorney specifically requested Karnofsky to deliver, on behalf of his clients, certain additional records including "individual employees' records showing deductions and withholdings from the individual employees' pays". R. 1648.

On or about July 17, 1956, petitioner was ordered to appear in person before the Erie County Grand Jury and was informed that he "was being played in the role of a prospective defendant." R. 1620. He thereupon refused to answer any and all questions asked by the District Attorney. Thereafter, petitioner was granted full immunity under § 2447 of the New York Penal Law and was then directed to answer and give testimony concerning the suspected bribery. Petitioner did in fact testify on several occasions pursuant to such direction. R. 1620-1621.

In the meantime, in May of 1956, the Internal Revenue Service began an investigation of the tax liability of one Thomas Panasci and his wife. R. 467-86. Information was developed to the effect that Panasci had worked for certain of the corporations owned by the petitioner herein and that the records of those corporations were in the hands of the Erie County District Attorney.

Then, in the words of Special Agent Kirchner of the Internal Revenue Service, "we were given permission

[1] Petitioner claimed that interspersed among the corporate records "were personal records of defendant in the form of checks, notes and other documents." R. 1621.

[by the District Attorney's office] to examine corporate records of Mr. Fago over at the District Attorney's office several days prior to the time when we issued the summons. They were given to us, his corporate records, pertaining to Mr. Fago." R. 467-89. This examination took place "around September" in 1956. R. 467-92. Kirchner concluded, after this preliminary examination in the District Attorney's office, that he wanted to examine these records "more fully in our office." R. 467-89. He also made known to the District Attorney that he "needed certain other records." R. 467-90. In admitting that he did "tell the District Attorney's office that . . . [he] needed for . . . [his] purposes more records," R. 467-91, Kirchner proclaimed ignorance of whether the District Attorney's office, as a result of his need for more records, thereafter issued other subpoenas to collect additional records. R. 467-91. Kirchner also denied knowledge at this time that petitioner Fago was then under investigation by the Internal Revenue Service. R. 467-96.

The trial transcript reveals, however, that the District Attorney issued various subpoenas duces tecum, returnable before the grand jury, to petitioner personally and to his various corporations not only under date of May 7, 1956, but also under the subsequent date of September 25, 1956. R. 467-76. Subpoenas dated September 25, 1956, were also directed to Karnofsky (the attorney for petitioner) and to Dopkins (the accountant for petitioner), commanding them to produce certain bank checks issued by petitioner's corporations. R. 467-79.

After the preliminary examination of these records in the office of the District Attorney, Special Agent

Kirchner on October 29, 1956, issued and served upon the Erie County District Attorney administrative subpoenas commanding him to produce all books and records in his possession of the three corporations owned by petitioner (Schultz, Nottingham and Rosedale), as well as all records, schedules and work papers furnished by petitioner's accountant, one Leonard B. Dopkins. R. 1639-1642.[2] The District Attorney's office, without notifying the petitioner and without securing any court approval, complied with the subpoenas. In fact, petitioner and his corporations were left totally unaware of the issuance of the subpoenas or of the transfer of the records. And no effort was made by agents of the Internal Revenue Service to secure permission from the appropriate state court to examine or acquire these records. The Internal Revenue Service was thus able at its leisure to examine the records in its own office and to make such photostats as it desired and to make such other use of the records as it saw fit. R. 467-97.

Insofar as federal tax investigations of petitioner or his corporations were concerned, the record reveals that an inquiry was made in 1952 with reference to the withholding tax liability of the K & F Packing and Food Corp., owned by petitioner. R. 467-102. This culminated in a trial in 1956 and the dismissal of the charges against petitioner. R. 467-106. The file concerning the liability of petitioner with reference to the charges underlying the instant case was apparently opened on March 28, 1958. R. 467-17.

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[2] Included among these work sheets and records of the accountant were income tax calculations respecting petitioner and his wife and a copy of their personal tax return. R. 467-29.

Various revenue agents denied that they had been in touch with the Erie County District Attorney's office regarding the instant charges. But Carman F. Ball, who was the First Assistant District Attorney of Erie County in 1956, testified that, as a result of reviewing the Fago records subpoenaed for grand jury purposes, he talked not only to the petitioner himself but also to revenue agents about petitioner's federal tax situation. On a number of occasions he asked petitioner "how do you keep track of this for income tax purposes?" R. 467-54. He also asked petitioner how he could possibly "get away with records like this with the income tax people." R. 467-55.[3] Such conversations occurred both before and after the service of the administrative subpoenas on the District Attorney.

Ball further testified that he talked to an Internal Revenue agent "maybe six, seven times" concerning petitioner's tax situation, saying, in general terms "How in the heck can a person get away with something like that?" R. 467-56, 57.

Petitioner at the trial moved to suppress the various documents and records that the Internal Revenue Service had acquired through the administrative subpoenas directed to the Erie County District Attorney, claiming *inter alia* that such acquisition was in violation of petitioner's rights under "the laws of the United States and the State of New York." R. 1624. A hearing apart from the jury was held with respect to the admissibility of these documents and records.

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[3] Petitioner's response was said to be to the effect that "I don't know, my accountant and attorney took care of that. I don't know anything about the books." R. 467-56.

R. 467-1 to 467-126. The District Judge ruled that these items, which were critical to the prosecution's case, were corporate rather than personal in nature and hence, under the authority of *United States* v. *White*, 322 U.S. 694, petitioner could not assert his personal privilege against self-incrimination so as to suppress these documents. R. 467-124, 125.

In affirming the conviction, the Court of Appeals repeated that petitioner had failed to show that any of the documents were his personal papers rather than records of his wholly-owned corporations.[4] Hence the court felt it must "decline the invitation" of petitioner "to consider large and interesting constitutional questions in regard to cooperation between state and federal officials enabling the latter to obtain indirectly evidentiary material which the Fifth Amendment would prevent them from obtaining directly."

REASONS FOR GRANTING THE WRIT

The judgment below involves a novel and significant issue in the administration of criminal justice in the federal courts, an issue warranting plenary consideration by this Court. Can critical documentary evidence be introduced that was acquired by federal agents, acting in collaboration with state agents, in flagrant violation of state law regarding the secrecy of grand jury proceedings? Is not such evidence as im-

[4] The Court of Appeals dealt with only one item of the alleged personal records—a group of sheets setting forth data as to employees of the Schultz and Nottingham companies for a particular week in 1955. The court held that such a compilation from the records of two corporations would seem, prima facie, to be a record of the two corporations. Petitioner's contention had been that the record had belonged to neither company and that it in fact belonged to him personally.

permissible in a federal trial as that acquired in violation of a federal law or policy and hence excludable under the relevant decisions of this Court? See *Nardone* v. *United States*, 308 U.S. 339; *Wong Sun* v. *United States*, 371 U.S. 471. Because a definitive answer to those important questions has not been supplied by this Court, the grant of certiorari becomes appropriate here so as to enable the formulation of the guidelines for federal courts confronted with similar problems.

The heart of this case is the fact that the documents in question, having been surrendered by petitioner and his corporations solely for purposes of a state grand jury inquiry and then being in the possession of the Erie County District Attorney, were first examined and later subpoenaed by Internal Revenue agents without any judicial authorization. Section 952-t of the New York Code of Criminal Procedure flatly prohibits the copying or taking of grand jury minutes or exhibits[3] without the express written authorization of the appropriate state court. As stated by the New York Court of Appeals in *People ex rel. Hirschberg* v. *Supreme Court*, 269 N.Y. 392, 199 N.E. 634, 635:

> "Such evidence may be made available if the court where the proceedings were had directs that the record of the proceedings and minutes of the evidence may be inspected or produced. Discretion is vested in that court.
>
> "The law requires that the secrecy of the testimony given before the grand jury be kept invio-

[3] The New York courts have interpreted Section 952-t to impose "the seal of secrecy" on both the transcript of testimony before a grand jury and the exhibits or documents submitted to that body. *De Lury* v. *Hogan*, 221 N.Y.S. 2d 566, 568.

> late, except 'upon the written order of the court,' duly made after hearing the district attorney. That can mean only the court in which the proceedings were had and the testimony was taken. The court which had part in the proceedings can best determine whether the seal of secrecy should be broken."

Indeed, so firm is "the seal of secrecy" thus imposed on grand jury records that any entry into the District Attorney's office to view or copy such items, without judicial authorization, is considered "a trespass, and very conceivably criminal." *In re Osborne*, 62 Misc. 575, 117 N.Y.S. 169, 174.

The New York law in this respect reflects the traditional policy respecting grand jury records. From earliest times it has been the policy of the law to shield the proceedings of grand juries from outside scrutiny. *Costello* v. *United States*, 350 U.S. 359, 362. Time and again this Court has referred to and insisted upon "the indispensable secrecy of [federal] grand jury proceedings." *United States* v. *Johnson*, 319 U.S. 503, 513; and see *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399.[6]

In New York the courts have recognized that, within the discretion and control of the judiciary, grand jury records may be inspected and used by other law enforcement agencies where necessary to facilitate the

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[6] See also *In re Holovachka*, 317 F. 2d 834, 837 (C.A. 7). Such secrecy as to federal grand jury records can be lifted only within the rigidly limited conditions of Fed. Rules Crim. Proc. 6(e). That rule has its counterpart in the provisions of Section 952-t of the New York Code of Criminal Procedure, with respect to the conditions under which state grand jury records may be released to other law enforcement officers.

administration of justice. Such agencies, concerned with matters unrelated to the grand jury inquiry, may obtain permission from court to examine these records upon a proper showing. See *People* v. *Behan*, 37 Misc. 2d 911, 235 N.Y.S. 2d 225. Federal law enforcement officers are among those eligible to seek such judicial permission. *Application of King*, 188 N.Y.S. 2d 249 (federal immigration authorities); *In re Attorney General of the United States*, 160 Misc. 533, 291 N.Y.S. 5 (federal mail fraud prosecutors).

But no such judicial permission was sought or obtained in this case. The Internal Revenue agents simply asked the Erie County District Attorney if they could examine in his office the grand jury documents in question. Not only did he permit that inspection but he proceeded to secure more documents from petitioner's corporations when advised that the agents needed more records for their purposes. And the District Attorney readily complied with the administrative subpoenas so as to permit physical transfer of the documents to the offices of the Internal Revenue agents for more leisurely inspection. Such acquiescence by the District Attorney in no way diluted the violation of Section 952-t, for it was not within the District Attorney's power to permit inspection of the grand jury records by federal officers. Only a state court judge could do that. The District Attorney's actions only underscored the failure to secure judicial consent. The poisonous tree thus took root in both federal and state soil.

The collusive violation of Section 952-t was more than a technical one. To invade "the seal of secrecy" without judicial authorization, however justifiable may be thought the need, is to undermine the consideration

paid by the State of New York for compelling the production of documents under protest. Citizens who are forced to supply records to a grand jury are entitled to rely upon the promise of Section 952-t that the records will be kept inviolate save where a judicial tribunal determines that a countervailing public necessity exists. See *Feldman* v. *United States*, 322 U.S. 487, 493.

The introduction at petitioner's trial of the tainted fruits of this Section 952-t violation poses a critical problem in the administration of federal criminal justice. Had the documents been acquired in a manner outlawed by a federal law or policy, the inadmissibility would have been clear.[7] Petitioner suggests that the same result must follow where the acquisition involves a violation of so important a state policy as that embodied in Section 952-t of the New York Code of Criminal Procedure.

Essentially, the question to be asked here is the same as was asked in *Wong Sun* v. *United States*, 371 U.S. 471, 488, quoting from Maguire, Evidence of Guilt, 221 (1959): ". . . whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." It would seem clear in this case that the documents were "come at by the exploitation of that [state law] illegality." Having acquired the documents unlawfully in connection with the Panasci investigation, the federal agents were in ready position to exploit that illegality when the tax investigation of the petitioner got

[7] Evidence is clearly inadmissible where obtained in violation of the federal Constitution, *Elkins* v. *United States*, 364 U.S. 206, or of a federal statute, *Nardone* v. *United States*, 308 U.S. 338, or of a federal court policy, *McNabb* v. *United States*, 318 U.S. 332.

under way; the records with respect to petitioner were available in the Internal Revenue offices.

Because federal agents were so intimately involved in both the original illegality and the ensuing exploitation, exclusion of the documents at a federal trial does far more than implement the state policy of secrecy respecting grand jury records. It was the failure of the Internal Revenue agents to seek court sanction for inspecting the records that created the breach in the state policy, a breach which those agents fully exploited in their detection of petitioner's tax violations. Such federal involvement in a state law violation in itself raises problems in regard to "federal-state cooperation in criminal investigation." *Elkins v. United States*, 364 U.S. 206, 222. But it also makes exclusion of the tainted evidence a matter of direct concern of the federal courts.[*] Exclusion is the only effective sanction against such lawlessness by federal agents.

Also relevant to the considerations affecting the grant of certiorari is the fact that to the extent to which the federal tax agents used the offices of the Erie County District Attorney and the grand jury as instruments for compelling the production of documentary material in order to detect federal tax violations, the caveat of this Court in *Feldman v. United States*, 322 U.S. 487, 494, becomes controlling:

> "If a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes, the doctrine of the *Byars* case, 273 U.S. 28, as well as that of *McNabb v. United States*,

[*] This involvement of federal officers distinguishes the instant situation from that in *Burdeau v. McDowell*, 256 U.S. 465, where the unlawful actions of private individuals in stealing certain documents later given to federal prosecutors and introduced at a federal trial were held not to render the documents inadmissible.

318 U.S. 332, afford adequate resources against such evasive disregard of the privilege against self-crimination."

See also *Knapp* v. *Schweitzer*, 357 U.S. 371, 380; and *Mills* v. *Louisiana*, 360 U.S. 230. Where, as here, the collusive use of the state agency by federal authorities results in an "evasive disregard" of the state seal of secrecy on grand jury records and in the securing of incriminating documents for federal prosecution purposes, the *Feldman* caveat dictates that the documents be excluded.

The answer to these problems in the administration of federal criminal justice is not to be found in the ruling of the Court of Appeals below that petitioner failed to show any of the documents involved were his personal papers rather than the records of his wholly-owned corporations. The intensely personal nature of the privilege against self-incrimination, *United States* v. *White*, 322 U.S. 694, is not the *sine qua non* of the standing to object to the introduction of evidence acquired in violation of federal policy relating to the administration of criminal justice. When a defendant is directly injured by the introduction of such evidence, as the petitioner was here, he has the requisite interest and standing to object, in terms of the relevant federal policy.[1]

[1] "So long as the 'error' violates the Court's standards for conducting judicial proceedings, reversal will usually follow even though the effect on the particular litigant may have been inconsequential or nonexistent. Where there was prejudice to the litigant, he is relieved of the need to demonstrate it; where there was none, he becomes the beneficiary of a gratuitous reversal of an unfavorable verdict because the judicial proceeding happened to be 'improperly conducted.'" Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656, 1657 (1963).

Indeed, to the extent that petitioner was convicted of failing, as principal officer of two wholly-owned corporations, to file withholding tax returns, the Government secured the conviction by means of piercing the corporate veil and imposing, under 26 U.S.C. § 7205, liability on the petitioner for a corporate dereliction. To deny petitioner the right to object to the introduction of these corporate records because of a wall created by the Fifth Amendment between an individual and a corporation is "to permit the Government to have the advantage of contradictory positions as a basis for conviction." *See Jones v. United States*, 362 U.S. 257, 263. The overriding federal policy at stake here precludes maintenance of any such inconsistency.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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